was without consideration he gets nothing; if it was voidable for infancy, insanity, or fraud, it is voidable as against the third party;[13] if the contract is vitiated by mistake of fact the third party acquires no right;[14] if the contract was illegal and void as to the promisee it is no less so as to the third party;[15] and if the promisor's duty is expressly or impliedly conditional the third party's correlative right is likewise conditional.[16]

There is no hardship whatever to the materialman involved in these rules. He has given no consideration for the surety's promise. He sold his goods in reliance upon the credit of the building contractor and upon his statutory lien. If these have depreciated in value, this was a risk he consciously assumed. If he has any right against the surety on the bond, it comes to him "by a sort of unexpected grace." If it is subject to some difficult condition, nothing is being taken from him; his gift is merely of less value than it might have been. He should not look his gift horse in the mouth. This is true even though the plaintiff was clearly intended as a beneficiary. *A fortiori* is it true if he is suing merely to avoid circuity of action by a sort of subrogation to the right of the obligee against the defendant. It makes absolutely no difference whether the third party is able to fulfil the condition or not. The legal relations constituting the contract were indeed "fixed" before he ever saw the document. He must take it as he finds it.

A. L. C.

TAXATION OF CAR COMPANIES DOING INTERSTATE COMMERCE

The drain on public finance, caused by the state's increasing participation in the social and industrial development of the present period, has exerted a tremendous pressure on the states to discover new sources of taxation. The vastly augmented amount of personalty, particularly, has engaged the earnest attention of the tax gatherer. Particularly has this gentleman's attention been directed to the property[1] of foreign

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[13] *Arnold v. Nichols* (1876) 64 N. Y. 117; *Jenness v. Simpson* (1910) 84 Vt. 127, 139, 78 Atl. 886; *Cohrt v. Kock* (1881) 56 Ia. 658; *Crowe v. Lewin* (1884) 95 N. Y. 423; *Dunning v. Leavitt* (1881) 85 N. Y. 30; *Green v. Turner* (1898, C. C. E. D. Wis.) 80 Fed. 41.

[14] *Crowe v. Lewin* (1884) 95 N. Y. 423; *Stevens Inst. v. Sheridan* (1878, Ch.) 30 N. J. Eq. 23; *Rogers v. Castle* (1892) 51 Minn. 428, 53 N. W. 651; *Episcopal Mission v. Brown* (1894) 158 U. S. 222, 15 Sup. Ct. 833.

[15] *National Surety Co. v. Kansas City Brick Co.* (1906) 73 Kan. 196, 84 Pac. 1034.

[16] *Jenness v. Simpson* (1910) 84 Vt. 127, 143, 78 Atl. 886; *Osborne v. Cabell* (1883) 77 Va. 462.

[1] The late Professor W. N. Hohfeld referred to the ambiguity in the use of the concept "property" in the following language: "A second reason for the tendency to confuse or blend non-legal and legal conceptions consists in the

owners located in the state, and to that engaged in interstate commerce.[2] but as much of this property is necessarily without permanent location in the state, a method had to be invented to reach the ambulatory property of carriers of all kinds. The question immediately arose as to how much "property" should and could be taxed. When would that line be reached beyond which the tax would be an unconstitutional burden on interstate commerce? To what methods would the courts assent?

Some requirements had already been formulated and still persist. The same tax must be levied on both domestic and foreign "property." The tax levied must bear some plausible relation to the amount of protection extended by the state. Only property within the state's limits may be taxed.[3] Yet the state may tax the intangible value created by what is called "the organic relation of the property in the state to the whole system."[4] But states cannot tax "property" both as part of a system and as separate pieces of tangible property where the combination tax exceeds the "unit" rule value.[5]

Various methods of determining valuation by proportional calculation have been attempted in order to increase the maximum revenue obtainable and still act within the limits defined by law. Such varied—and often inharmonious—modes have been tested by the courts empirically without blanket approval of any one in particular, judicial attention having been focussed on the result achieved. The form of the legislative enactment has been regarded as immaterial; the results obtained have been made the test as to whether the method adopted was a valid exercise of the state's power.[6]

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ambiguity and looseness of our legal terminology. The word "property" furnishes a striking example. Both with lawyers and laymen this term has no definite or stable connotation. Sometimes it is employed to indicate the physical object to which various legal *rights, privileges,* etc., relate; then again—with far greater discrimination and accuracy—the word is used to denote the legal interest (or aggregate of legal relations) appertaining to such physical object." (1913) 23 YALE LAW JOURNAL, 16.

[2] *American Refrigerator Transit Co. v. Hall* (1898) 174 U. S. 70, 19 Sup. Ct. 599; *Union Refrigerator Transit Co. v. Lynch* (1899) 177 U. S. 149, 20 Sup. Ct. 631.

[3] Discussion of when chattels are, for purposes of taxation, considered within the borders of a state may be found in Beale, *The Situs of Things* (1919) 28 YALE LAW JOURNAL, 525.

[4] *Adams Express Co. v. Ohio State Auditor* (1897) 166 U. S. 185, 17 Sup. Ct. 604; *Western Union Tel. Co. v. Taggart* (1896) 163 U. S. 1, 16 Sup. Ct. 1054.

[5] *Meyer v. Wells Fargo & Co.* (1912) 223 U. S. 298, 32 Sup. Ct. 218. See *infra* for discussion of the "unit rule."

[6] "A state tax is invalid, whatever its form, if, in effect, it lays a direct burden upon interstate commerce; and . . . . conversely, a state tax is valid, however measured, or . . . whatever its form, which may be fairly held to be a tax on the property of the company, whether tangible or intangible." Willoughby, *Constitutional Law,* 723.

Many states have adopted the so-called "unit rule." This is taxing a corporation doing interstate business according to the relation which the "property" or, ordinarily, track mileage within a given state bears to the entire "property" or mileage. This first calculation of the relative quantities of "property" obviously results in a ratio, showing what fraction of the corporation's total assets the state concerned may tax. Suppose a railroad company controlling one hundred miles of track has forty miles in state A and sixty miles elsewhere. State A may collect its tax on forty one-hundredths of the railroad's assets. But there remains a second operation: applying the ratio to the total assets. And first it must be determined what those total assets are; what shall be taken as their measurement. What is the *base* to which the ratio, when obtained, is to be applied? In regard to railroad, telegraph or express companies, the gross receipts have been found a satisfactory base.[7] Capital stock has also been sustained.[8] Capitalization is of course no certain measure of taxable value, but it has been found acceptable when limited by the reasonableness of the tax in *amount* as the ultimate test of its validity. And some states have applied the track mileage ratio, when obtained, to the *true value* of the "property," tangible and intangible. Methods of computing this true value vary greatly;[9] but it would seem, if carefully calculated, to be the fairest base obtainable.

But when applied to car or equipment companies, whose property is continually in and out of the state, the track mileage rule is likely to fail, regardless of which of the above bases is employed. So a recent decision of the United States Supreme Court,[10] *Union Tank Line v. Wright* (1919) 39 Sup. Ct. 276, over a vigorous dissent has held this "unit" method, where the ratio was applied to the "value" of the property of such a company, to be a violation of the "due process" clause, and also a burden on interstate commerce. Georgia, in this case, imposed a tax upon the entire value of the car company's property at the ratio which the number of miles over which its cars had the privilege of operating in the state bore to the total mileage over

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[7] *Adams Express Company v. Ohio, supra.*

[8] *Western Union Tel. Co. v. Taggart, supra.* The Arkansas statute was upheld even though it did not exact any limitation as to the maximum amount of tax. *St. Louis S. W. Ry. v. State of Arkansas* (1914) 235 U. S. 350, 35 Sup. Ct. 99. This was provided for by the Kansas statute (*Lusk v. Botkin* (1916) 240 U. S. 236, 36 Sup. Ct. 263) enacted after the tax on total capital stock not measured by the property in the state had been held invalid in *Western Union Tel. Co. v. Kansas* (1910) 216 U. S. 1, 30 Sup. Ct. 190.

[9] The exact mechanics of determining the assets vary with the states, but an effort is always made to include the value of "intangible property," "good will," "franchise," etc.

[10] For a more complete statement of the facts, see RECENT CASE NOTES, p. 826, *infra*.

which its car might run.[11] The result was that fifty-seven cars, the average number constantly used in Georgia in the taxable period, cars which cost $47,000, were taxed as $291,000. Certainly the number of miles of track in the state over which these cars might run offered no reliable clue to either the value or the number of the company's cars operated therein. With this form of tax in force the inequality is manifest between a state with small mileage but heavy car traffic and a state with extensive mileage but little used by car or equipment companies.

A vigorous dissent in the instant case was based on an apparent departure by the majority from what had hitherto been the leading car company decision, *Pullman Palace Car Co. v. Pennsylvania*.[12] The court in that case seemingly approved the track mileage method. Yet a careful study of the opinion shows that the mode of assessment was not judicially passed on at all. The court was only called upon to determine whether such property was taxable. True, the mode of arriving at the tax might have been a ground for invalidity, but since the result *happened* to be reasonable in that instance, the point was not specifically adjudicated. The language used indicates, however, that the tax was regarded as one upon the average number of cars used in the state.[13]

When the tax has been measured by the *average* amount of "property" used within the state, it has been generally upheld.[14] And as applied to equipment companies, this method is, as taxation goes, very fair. To be sure, equipment companies have but little "property," permanently locating in any taxing state, but roving cars may be averaged on a basis of car-days, spent within the state, and an average struck at which it is hard to cavil.

While in the course of time, then, less and less unscientific modes of assessment have been devised, still the validity of the taxes is even to-day in many cases haphazard, and dependent upon the chance results obtained. The tendency appears to be, however, in the direction of sounder, more scientific action.

Connecticut, along with several other states, has lately taken the lead with an economically sound and legally sustainable statute,[15] the result

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[11] Georgia Civil Code, secs. 989, 990, 1031.

[12] *Pullman Palace Car Co. v. Pennsylvania* (1890) 141 U. S. 18, 11 Sup. Ct. 876.

[13] As stated by Mr. Justice Gray at p. 26: "The route over which the cars travel extending beyond the limits of the State, particular cars may not remain within the State; but the company has at all times substantially the same number of cars within the State, and continuously and constantly uses there a portion of its property; and it is distinctly found, as matter of fact, that the company continuously, throughout periods for which these taxes were levied, carried on business in Pennsylvania, and had about one hundred cars within the State."

[14] *American Refrigerator Transit Co. v. Hall, supra.*

[15] Conn. Rev. St. 1918, secs. 1379-83.

of an expert investigation.[16] By the Connecticut method, the tax on an interstate car company is levied upon that portion of the *gross earnings* which the ratio of miles run by the cars in Connecticut bears to the total interstate *car-mileage*. This is in lieu of all other taxes.[17] This would seem to give a nicer ratio even than car-days; not only in the *base* does going value find consideration, to fix the total taxable assets of the company; but in the ratio—for car mileage obviously bears a close relation to the amount of the going value which is derived from the use of cars in the taxing state.

All of the objectionable features of the other schemes are hereby eliminated, except the difficulty of administration, which could be alleviated by the requirement of adequate statistical information from the companies. Gross earnings are an equitable measure of the total fixed and going value of the "property." And the number of miles traveled in a state would seem to be a fairly accurate indication of the benefits, protection and business derived from the state.

THE LAW DETERMINING THE NATURE OF A TRANSACTION AS CIVIL OR COMMERCIAL

In most of the countries of continental Europe and of Central and South America the law merchant has not been absorbed by the general law of obligations and is codified to-day in commercial codes which exist side by side with civil codes. This fact makes it frequently necessary to distinguish between a *civil* and a *commercial* transaction. The importance of the difference may relate to the jurisdiction of courts or to the substantive law that is applicable. To illustrate: Litigation relating to commercial transactions must be brought in some countries (for example, France) before special courts. Or a contract that is entered into by several parties may impose upon such parties a joint liability if the contract is governed by the provisions of the civil code, and a joint and several liability if it is controlled by the provisions of the commercial code. From the standpoint of the conflict of laws also, one rule may be applicable to a civil obligation and another to a commercial obligation. Where a contract is made in one country and suit is brought upon it in another, the problem may arise therefore which law shall determine the nature of the transaction as civil or commercial.

A decision of the Court of Appeals of Milan of July 1, 1914, suggests that in so far as the question concerns the substantive law that is

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[16] Report of the Special Commission on Taxation of Corporations (1913) in accordance with Public Acts of Conn. 1911, ch. 283.

[17] Conn. Rev. St. 1918, sec. 1386. When such taxes are levied in lieu of all other taxes, courts usually sustain them. *Cudahy Packing Co. v. Minnesota* (1918) 246 U. S. 450, 38 Sup. Ct. 373.